(4)

No. 04-581

Supreme Court, U.S.
FILED
JAN 14 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TAXPAYERS OF MICHIGAN AGAINST CASINOS,

Petitioner,

v.

THE STATE OF MICHIGAN, NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, AND GAMING ENTERTAINMENT, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF OF PETITIONER

ROBERT J. JONKER*
DANIEL P. ETTINGER
JOHN J. BURSCH
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000
Counsel for Petitioner

January 14, 2005

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONERS 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003) 2

Cuyler v. Adams, 449 U.S. 433 (1981) 6

Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536 (8th Cir. 1996) 3

Keweenaw Bay Indian Community v. United States, 136 F.3d 469 (6th Cir. 1998) 2

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997) 6

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 6

Williams v. Lee, 358 U.S. 217 (1959) 7

STATE CASES

Panzer v. Doyle, 680 N.W.2d 666 (Wis. 2004) 3

Saratoga County Chamber of Commerce v. Pataki, 798 N.E.2d 1047 (N.Y. 2003) 3

State ex rel. Stephan v. Finney, 836 P.2d 1169 (Kan. 1992) 3

STATUTES

28 U.S.C. § 1166 ..... *passim*

28 U.S.C. § 1257 4

REPLY BRIEF OF PETITIONERS

TOMAC's petition for certiorari sets forth a clear, substantial, and mature conflict on an important question of federal statutory interpretation: whether Congress empowered the States under the Indian Gaming Regulatory Act to establish the regulatory rules applicable to Indian casino gambling within a State's borders. Respondents claim that the Michigan Supreme Court's ruling on this issue was mere dictum, and thus irrelevant to the Michigan Supreme Court's analysis of whether HCR 115 constituted legislation. (State Opp. 11 ("the Michigan Supreme Court's resolution of the state constitutional claim did not depend on its view of the federal issue cited by Petitioner"); Gaming Entertainment Opp. 2 n.1 ("The question presented by Petitioner . . . was discussed by the Michigan Supreme Court only in *dicta*.")) But Respondents' claim is wrong: the Michigan court's mistaken construction of federal law was the necessary predicate for its state law ruling.

In determining whether HCR 115 constituted legislation, the Michigan Supreme Court stated, unequivocally, that "IGRA only grants the states bargaining power, not regulatory power, over tribal gaming." (Pet. App. 15.) This statement ignores Section 1166's plain and unambiguous text, which states that until such time as a compact is in effect, "all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." (Pet. App. 13.) Based on its misinterpretation of this critical federal statute, the Michigan Supreme Court concluded that HCR 115 was not legislation because it modified only federal, not Michigan, law:

> Although Michigan's gaming law would have applied to gaming on tribal lands in the absence of a tribal-state compact, it applied only as a matter of *federal* law. Compacts establishing the terms of class III gaming on tribal lands modified only federal law. Therefore, our Constitution does not require that our Legislature express its approval of these compacts through bill rather than resolution.

(Pet. App. 3 (underlined emphasis added).)[1]

Respondents do not, and cannot, impugn the plain import of this holding, which is contrary to the view of the United States Courts of Appeals for the Ninth and Sixth Circuits, but aligned with published authority from the Eighth Circuit. *Compare Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 721-22 (9th Cir. 2003) ("IGRA . . . devised a method to give back some of the *regulatory* authority that the Supreme Court had held inapplicable to Indian lands in *Cabazon*. . . . [T]he fact that the federal government retained [enforcement] power does not change the fact that California may enact laws and regulations concerning gambling that have an effect on Indian lands via § 1166.") *and Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 472 (6th Cir. 1998) ("Congress enacted the IGRA in 1988 and thereby created a framework for the regulation and management of gambling on Indian land . . . which included a role for

[1] It was only through the Michigan Supreme Court's tortured interpretation of IGRA that it was able to conclude that a Michigan legislative resolution – a procedure ordinarily reserved for non-substantive matters such as the recognition of a 100th birthday or the state flower – actually "approves a change in *federal* law." (Pet. App. 14.)

the states in the regulation of Indian gaming. . . .") *with Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) ("Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the *only* method by which a state can apply its general civil laws to gaming is through a tribal-state compact.").

Had the Michigan Supreme Court properly interpreted IGRA as vesting some regulatory power in the State over Indian gaming, the Court would have been obligated to conclude that HCR 115 was legislation, thus requiring a majority of both houses of the Michigan Legislature for passage, as many other state supreme courts have held. *See, e.g., State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1185 (Kan. 1992) ("[M]any of the provisions in the compact would operate as enactment of new laws and the amendment of existing laws."); *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003) ("Compacts addressing [regulatory issues] necessarily make fundamental policy choices that epitomize 'legislative power.'"); *Panzer v. Doyle*, 680 N.W.2d 666, 687 (Wis. 2004) (compacts "involve subtle and important decisions regarding state policy that are at the heart of legislative power"). (*See also* Pet. App. 86 n.48 (Markman, J., dissenting) ("every state supreme court that has directly considered this issue has held that tribal-state gaming contracts constitute legislation").)

Rather than address this conflicting authority head on, Respondents attempt to side step it by improperly reframing the question presented as one involving solely Michigan law (Gaming Entertainment Opp. i), or one

involving state regulatory power *after* a compact has been entered (State Opp. i).[2] Respondents then devote substantial space knocking down these strawmen, contending that their reframed questions are not the subject of a split in authority, and do not raise a federal question.

But both of Respondents' reframed "questions presented" are misguided caricatures of the actual basis for the Michigan Supreme Court's holding, which is quoted above. And once the Michigan Supreme Court's actual holding is considered, all of Respondents' objections to this Court's grant of certiorari fall away:

- The Michigan Supreme Court has misinterpreted a federal statute, thus leading the Court to improperly uphold an invalid State act. Such a decision falls within the scope of 28 U.S.C. § 1257(a) and vests jurisdiction in this Court (*contra* Gaming Entertainment Opp. 1-2.);

- The Michigan Supreme Court's misinterpretation of IGRA was the necessary predicate for its holding that HCR 115 was not legislation, thus creating the federal question that TOMAC asks this

[2] Alternatively, the State of Michigan argues that there is an adequate and independent state ground for the Michigan Supreme Court's decision, because even if this Court adopts TOMAC's position and applies Section 1166's plain language, the "Michigan Compacts would still be the products of mutual assent, not the result of unilateral state regulation." (State Opp. 14.) To begin, the State's argument ignores other, critical parts of the Michigan Supreme Court's holding. In addition, the State's position is wrong. If Section 1166 does vest some regulatory authority in the States over Indian gaming, as TOMAC asserts, then the Michigan Legislature's "unilateral" abdication of this power was itself legislation. Even though both the State and a Tribe were required to assent to a compact, only the State, acting unilaterally, had the ability to give up its federally delegated regulatory power over the Tribe.

Court to address (*contra* Gaming Entertainment Opp. 10-14);[3]

- The Michigan Supreme Court's decision cannot be reconciled with the decisions of sister States which, even if they did not cite 28 U.S.C. § 1166, relied on State regulatory power over Indian gaming to determine that compact execution requires legislation (*contra* Gaming Entertainment Opp. 14-20; State Opp. 17-20);

- The Michigan Supreme Court's holding that States have no regulatory power over Indian gaming cannot be reconciled with the contrary holdings of the Ninth and Sixth Circuits (*contra* Gaming Entertainment Opp. 20-22; State Opp. 15-16); and

- There is no adequate and independent state ground for the Michigan Supreme Court's decision, because the Court's decision depended directly on its misinterpretation of a federal statutory scheme (*contra* State Opp. 10-14).[4]

---

[3] Contrary to Gaming Entertainment's suggestion (Gaming Entertainment Opp. 11), TOMAC does not shrink from its assertion that the penultimate issue presented to the Michigan Supreme Court was one of state constitutional law, namely, whether Michigan's Constitution requires a legislative majority to execute a compact. To answer that question, however, the Michigan Supreme Court erroneously interpreted federal statutory law, an error that was ultimately fatal to the Court's state law analysis. The lower court record is replete with arguments regarding Section 1166's interpretation, and the issue is squarely addressed by the Michigan Supreme Court's opinion. It is more than disingenuous for Gaming Entertainment to imply that this question was not "pressed or passed upon below." (Gaming Entertainment Opp. 2 n.1.)

[4] *Compare* State Opp. 2 ("the court's understanding of IGRA did not decide the outcome of the state constitutional issue") *with* Pet. App.

(Continued on following page)

Respondents are similarly misguided when they argue that this case does not implicate the Compact Clause of the United States Constitution. (State Opp. 20-22; Gaming Entertainment Opp. 22-25.)[5] Although Congress enacted IGRA under its Indian Commerce Clause authority, as this Court held in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996), Congressional authorization of State-Tribe compacts, by definition, transforms the compacts into federal law under the Compacting Clause. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981) ("Where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the State's agreement into federal law under the Compact Clause."). It should be no surprise, then, that at least one federal court of appeals has analogized State-Tribe gaming compacts to interstate compacts. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997). At a minimum, when Congress exercises its authority under the Indian Commerce Clause to delegate regulatory power over Indian affairs to the States, any dispute is, by nature, an appropriate matter

---

3 ("Compacts establishing the terms of class III gaming on tribal lands modified only federal law. Therefore, our Constitution does not require that our Legislature express its approval of these compacts through bill rather than resolution.") (emphasis added).

[6] Respondent State of Michigan mischaracterizes TOMAC's position below when it claims that TOMAC "flatly asserted that '[t]he federal Compact Clause is . . . inapplicable." (State Opp. 21 n.5.) TOMAC's argument there related solely to the Michigan Court of Appeals' holding that the Compact Clause was relevant in determining the way in which a state must enter into compacts. (State App. 121a (TOMAC's brief); Pet. App. 117-23 (Court of Appeals opinion).) It had nothing to do with whether a state court's interpretation of IGRA implicates a federal question.

for this Court's review. *See Williams v. Lee*, 358 U.S. 217, 218 (1959) (this Court will grant certiorari to address "important question[s] of state power over Indian affairs.").[6]

Finally, Respondents' own unique interpretation of Section 1166 (State Opp. 23-27; Gaming Entertainment Opp. 25-30) wreaks havoc on that statute's plain language and historical *raison d'etre*, as explained more fully in TOMAC's Petition. (Pet. 13-14, 19-25.) The confusion inherent in Respondents' understanding and the divided judicial opinions on this issue counsel strongly in favor of this Court's immediate intervention to resolve the growing split in federal and state court authority and to clarify the extent and nature of State regulatory power over Indian gaming.

---

[6] Gaming Entertainment also references the Michigan Supreme Court's remand regarding the Governor's compact amendment power, a narrow, state law issue. (Gaming Entertainment Opp. 9 n.8.) This is a red herring, intended to distract this Court from the actual federal question presented. The Court of Appeals has already stated that it will confine its ruling solely to the amendment power (*see id.*), and that proceeding therefore cannot and will not have an effect on the split in authority regarding the regulatory power Section 1166 grants to States over Indian gaming, the sole question presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. JONKER*
DANIEL P. ETTINGER
JOHN J. BURSCH
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000
Counsel for Petitioners

**Counsel of Record*

JANUARY 14, 2005